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No. 82-830

In the Supreme Court of the United States

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

Petitioners,

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondents, in their Brief in Opposition, have egregiously gone outside the record to suggest that no controversy remains in this case. As this characterization of the case is inaccurate and misleading, petitioners are compelled to reply.

Following the Seventh Circuit's vacate and remand decision, respondents suggested that petitioners should make out of court recommendations of forms of headcoverings which, to respondents' satisfaction, might comply with the Court of Appeals' majority opinion. This post appellate suggestion to set up respondents and their experts in place of the District Court is inadequate not only because it is even less than the remedy the majority provides, but more importantly, because neither the respondents' offer nor the majority decision have

eliminated the controversy here.

The majority and respondents maintain that by shifting onto the petitioners the burden of finding a headcovering that 1) "never" falls off; 2) is not otherwise unsafe; 3) at "zero cost" to petitioners; and 4) otherwise does not violate petitioners religious beliefs and practices, this controversy is eliminated. We vigorously disagree.

Finding an absolutely risk free headcovering with no adverse effect on petitioners' rights is indisputably a heavy burden, probably insurmountable, regardless of the respondents' (and the majority belows') outside the record speculations. Furthermore, is not subjecting Orthodox Jewish boys to likely ridicule in the community by forcing them to wear bizarre headwear while playing interscholastic basketball "a

cost" to petitioners, especially where the safety hazards posed by their discreet bobby pin or clip secured yarmulkes have been known and proven to be merely speculative?

Throughout this case the respondents' unyielding position has been the absolute prohibition of religiously mandated headwear regardless of securement. Their very recent posture is understandable in light of the Seventh Circuit's statement that the respondents would be on "constitutional quicksand" if they would "prove to be so obdurate" as to refuse to accommodate petitioners if petitioners could show a means of accommodating their religious beliefs at "no cost to the only objective, safety." However, the controversy remains that the method of accommodating petitioners' beliefs at "no cost to safety" was already found as fact by

the District Court after full evidentiary hearing, and the Court of Appeals has attempted to overturn such findings without applying the clearly erroneous rule.[1]

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1. The record relied upon by the District Court included the substantial history of literally thousands of basketball games played by players wearing yarmulkes secured with bobby pins or clips, including direct testimony by the chairman of the New York Metropolitan Yeshivah High School Athletic League whose 15 member teams all play with yarmulkes fastened with bobby pins, and the affidavit of the assistant athletic director at Yeshivah University for which the Eastern Collegiate Athletic Conference (part of the NCAA) waived its headwear ban as it applied to yarmulkes. There was not a scintilla of evidence in the whole record that indicated anyone ever witnessed or heard of even one single slip, fall, or injury caused by yarmulkes or the pins or clips which secure them to the head during basketball play.

The majority below did not impliedly apply the clearly erroneous rule, as the respondents argue.[2] Indeed, in its second opinion, the majority expressly admits that it did not do so, and enunciates a novel doctrine justifying its actions.

Petitioners agree with the dissent below that in light of the clear record, the District Court's careful findings of fact and this Court's dictates on burden of proof, the majority should not have vacated and remanded the District Court's decision, since "requiring the (petitioners) to take additional affirmative

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2. Under this Court's dictates pronounced in Pullman-Standard v. Swint, - U.S. -, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982), the clearly erroneous rule must be expressly and thoroughly applied by the Court of Appeals. Implication is not sufficient.

action is both unnecessary and inappropriate." For the foregoing reasons and those stated in our Petition, petitioners reiterate that this case presents important, novel questions justifying this Court's review. Petitioners further note that the controversial argument raised by respondents that first amendment rights can be disregarded as de minimus is yet another reason this case is of such compelling importance that a writ of certiorari should issue.

Respectfully submitted,

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